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In The
Supreme Court of the United States

October Term, 1955

No. 247

CHARLES EDWIN YORK,
Petitioner,

VERSUS

H. C. MCLEOD, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

CHARLES EDWIN YORK, Petitioner.
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In The
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H. C. MCLEOD, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

May It Please the Court:

The petition of Charles Edwin York, inmate of the Oklahoma State Penitentiary at McAlester, Oklahoma, respectfully shows to this Honorable Court:

(a) OPINIONS

York v. *State* (A-12086) — entered March 23, 1955, reported in 281 P. 2d 769.

In re: *York* (A-12181), entered April 27, 1955, reported in 283 P. 2d 567.

(b) JURISDICTION

Jurisdiction of this Court is invoked to review, by certiorari to the Criminal Court of Appeals of the State of Oklahoma, a tribunal of last resort in criminal matters, a judgment dismissing petitioner's original petition for a Writ of Habeas Corpus, (i) which judgment was entered April 27, 1955, (ii) no petition for re-hearing having been filed and no extension of time granted, but this petition being filed within ninety days from the date of said judgment as provided by Title 28, Section 2101 (d), USCA, and Rule 22 (1) of this Court; (iii) jurisdiction of this Court is being invoked under Title 28, Section 1257, (3) USCA.

(c) QUESTIONS PRESENTED

The petition for writ of habeas corpus was dismissed upon the grounds that petitioner has waived his right to have "exclusive assistance of counsel" and further, for the reason that "question raised in habeas corpus was in existence and known to petitioner at the time of appeal and was a matter which properly should have been presented by appeal" (Appendix 14).

Petitioner contends that the action of the Criminal Court of Appeals of Oklahoma amounted to an arbitrary

defenestration of his claim of denial of a federally protected right and that the decision of the court below constitutes a fatal departure from the accepted concept of Due Process and is in collision with the pronouncements of this Court.

Embraced in the argument are the following propositions:

1. The petition for habeas corpus to the Criminal Court of Appeals alleges facts supporting a contention of denial of a right protected by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

2. The Criminal Court of Appeals denied petitioner due process of law in refusing to grant him a hearing on the merits.

3. The Criminal Court of Appeals, in denying petitioner the remedy of habeas corpus, unreasonably discriminated against him and deprived him of equal protection of the laws.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES

Title 28, Sec. 1257, U. S. C. A. subparagraph 3, reads:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Section 1 of the Fourteenth Amendment to the United States Constitution reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(e) STATEMENT OF CASE

In March, 1954, the petitioner, Charles Edwin York, had been convicted in the District Court of Oklahoma County, State of Oklahoma, of the crime of robbery with firearms, a capital offense, and was sentenced to a term of 45 years. While an appeal from this conviction was pending in the Criminal Court of Appeals of Oklahoma, the petitioner obtained evidential proof from various testimonies given in the trial of his confederate Hurt, in February, 1955, that two of the attorneys representing petitioner at the time of his trial were trammeled and impaired by adverse influence of Hurt, who

had secretly engaged petitioner's chief counsel to act in the interest of his cause. Thereupon, in March, 1955, petitioner filed in the Criminal Court of Appeals an original proceeding for Writ of Habeas Corpus alleging failure of effective assistance of counsel and denial of due process in violation of his rights under both the State and Federal Constitutions. The allegations showed no inconsistency with the record. The petition was dismissed without requiring the Attorney General to file a response and without granting a hearing upon the merits. A review of the decision below dismissing the petition for habeas corput is sought herein.

The petitioner does not deny guilt, his sole contention being that he is presently held under invalid judgment rendered in violation of his constitutional rights.

The facts present a rather unedifying imbroglio of perfidy and intrigue.

On the return to their Oklahoma City home late in the evening of August 26, 1953, Mr. and Mrs. Gurley B. Lenn, manufacturers of gambling equipment, were tortured by two armed and masked bandits concealed inside the residence and were robbed of $5,000.00 in currency as well as of two guns and miscellaneous articles of jewelry. Subsequent investigation by Oklahoma City Police led early in September, 1953, to the arrest of one Wayne Adrian Burns, a constable from Cordell, Oklahoma. Several weeks thereafter the petitioner was appre-

hended in Tulare, California, and later returned to Oklahoma City to stand trial on charges of being the accomplice of Burns. Although early in the progress of investigation the totality of facts available indicated that the robbery had been planned and instigated by a close friend and associate of the Lenns, one Robert O. (Bob) Hurt, an Oklahoma City constable, sufficient evidence was then lacking to support a charge against him.

After his confinement in jail and prior to York's arrival from California, Burns engaged at first Mr. Wendell Stockton, an Oklahoma City lawyer, who acted briefly as his counsel. Subsequently, upon urging and approbation of Hurt, attorney Frank Massad was retained by Burns. Not fully satisfied with Massad, the mother and brother of Burns approached attorney Gomer Smith, Jr., who, declining employment in the case, recommended David Tant, a prominent criminal lawyer. Mr. Tant was then engaged as chief counsel for Burns. With Frank Massad remaining in the case as associate counsel the defense cast was finally completed when the late Raymond Plumlee of Cordell, Oklahoma, Burns' home town lawyer and a trusted friend of the family, had been co-opted as another co-counsel. It was agreed that the attorneys will receive as their honorarium for the representation of Burns the sum of $7,500.00. This amount was paid in *toto* by the family of Burns (Appendix 30). It was further understood that counsel will probably repre-

sent the petitioner as that seemed essential to protect the interest of Burns (Appendix 31, 40). But no mention was ever made that Hurt was to be in any way included in the representation thus undertaken.

On his arrival from California, the petitioner was immediately showered by Burns and his attorneys with overtures of assistance. Having no means of his own to employ counsel, York was easily lured by the promised advantages of waging a "common battle" with Burns. Assured that by co-ordinating defenses with Burns he will not only secure the guidance of experienced counsel but also share in the benefit of "alibi witnesses" who were to be "engaged to beat the case", York was given a sense of false security and became a captive tool in the defense machine (Appendix 4).

Thereafter in December, 1953, York and Burns were jointly indicted for the crime of robbery with firearms, *a capital offense* under Oklahoma law. Severance having been asked and granted, the State elected to try the petitioner first. Convicted by the jury, York was sentenced on March 15, 1954, to serve a term of 45 years. After petitioner's conviction, Burns, warned by his home town lawyer, Plumlee, that the actions of attorneys Tant and Massad indicated that they were secretly protecting the interest of the then unexposed confederate Hurt, was advised and urged to make a full disclosure of facts to the prosecuting official and offer to assist the State in

securing a conviction of Hurt. Acting on Plumlee's advice, Burns announced on May 12, 1954, in open court, that he was discharging all three attorneys who had theretofore represented him. Thereupon he retained another counsel and confessed to his own participation in the robbery, established York's part therein and implicated Hurt as the master conspirator. Hurt was forthwith charged with the crime of robbery with firearms. It is not without significance to note that Tant and Massad, the discharged attorneys of Burns who had also acted as petitioner's counsel at his trial, now undertook to represent Hurt. At first Hurt vehemently deni d that relations of attorney and client had existed between him and either Massad or Tant prior to the time of Burns' confession. When on the stand in support of his application for admission to bail on May 18, 1954, Hurt gave a categorical "no" to all such questions.

Several weeks thereafter, in July of 1954, Massad, having been charged with a crime of perjury as a result of his activities in another case, was forced to withdraw from active practice. Later he volunteered his services to the State as a witness in the prosecution of Hurt. Subsequently Massad testified in both trials of Hurt; the first time in November, 1954, which proceeding ended in a mistrial, and then in February, 1955, when the trial resulted in a conviction. To exclude Massad's testimony objection was advanced in both trials by Mr. Tant, act-

ing on behalf of Hurt, that the evidence was inadmissible on the ground of its being within the attorney and client privilege. This contention, of course, was inconsistent with Hurt's previous denial of such relationship. The court both times permitted Massad to testify as to communications with Hurt which took place prior to the confession of Burns and subsequent to the time Massad was charged with perjury, finding from the evidence and as a matter of law that relations of attorney and client existed between Hurt and Massad only during a brief period between Burn's confession (May 12, 1954), and Massad's forced withdrawal from the case in June or July, 1954.

The testimony given by Massad in both trials of Hurt poignantly revealed that Hurt, unknown to Burns and York, had continuously and persistently exerted influence upon the conduct of the defense, causing Tant and Massad to so shape the overall defense strategy as to primarily insure maximum protection of Hurt's own interest in the case. Mr. Tant, in his own testimony at the Hurt trial, and later in a statement to the Criminal Court of Appeals (Appendix 30), readily admitted that contemporaneous with his representation of Burns and York, he had also acted as attorney for Hurt. Conceding though that neither Burns nor York had expressly consented to joint representation with Hurt, Mr. Tant maintained (see statement Appendix 31, 32), that from the

conversations had between him and York the latter certainly "understood" that such employment might be possible in the event that Hurt should be charged with the same crime.

Following his conviction in March, 1954, Massad and Plumlee both wholly abandoned the petitioner's cause. However, Mr. Tant, then busily engaged in helping the cause of Hurt and apparently attempting to prevent York from becoming a witness against Hurt, took preliminary steps to appeal petitioner's conviction; he sought several continuances, but failed to perfect the record. His efforts were later abandoned without any notice or explanation to York. It is pertinent to note that the date of abandonment of appeal coincides with the time of York's appearance to testify on behalf of the prosecution in the trial of Hurt in November, 1954 (Appendix 36).

Unaware of Mr. Tant's change of heart and misled by his unqualified assurances that an appeal will be perfected [the last of which was uttered in open court during the November, 1954, trial of Hurt (Appendix 8)], petitioner did not learn of the abandonment of appeal by Tant until after the second Hurt trial, sometime in March of 1955.

On learning the facts in regard to his appeal status, and in awareness that his appeal had been frustrated by Mr. Tant, the petitioner retained present counsel to pro-

ceed in his behalf to the Criminal Court of Appeals with an application for a writ of habeas corpus. Relying on Massad's revelations made in the trial of Hurt, and the testimony of the Burns' family adduced thereat, the petitioner sought a new trial upon the ground that he was held under an invalid judgment of conviction secured in violation of rights guaranteed under the Federal and State Constitutions. Petitioner contended that he had been deprived of effective assistance of counsel, and further, that his conviction was had upon a trial which did not satisfy the requirements of due process (Appendix 9).

The petition for a writ of habeas corpus (Appendix 3), was filed in the Criminal Court of Appeals on March 16, 1955. The court, having assumed original jurisdiction in the matter, set the cause for a hearing on April 6, 1955, at which time counsel appeared.

Inasmuch as the Attorney General was unwilling to enter into any stipulation of facts, evidence was offered in support of the petition. However, the court below not only refused to allow the petitioner and co-indictee Burns (then still confined in the Oklahoma County Jail), to testify, but also declined to hear other witnesses present in court room who had come to give testimony on behalf of York. Counsel and the Attorney General were permitted only a brief oral argument after which the matter was taken under advisement. Thereafter the Criminal

Court of Appeals, in an unprecedented move and acting *sua sponte*, called Mr. Tant to appear and give a statement in the case. Mr. Tant subsequently appeared on April 11, 1955, for what could be termed a judicial indagation (Appendix 9). He was examined without the presence of either the State or the petitioner. On April 27, 1955, the court below, without previously requiring the Attorney General to file a response and without further hearing in the matter, entered its opinion dismissing the petition upon the ground that the petitioner had waived his right to have "exclusive assistance of counsel" and further, for the reason that the "question raised in habeas corpus was in existence and known to petitioner at time of appeal and was a matter which properly should have been presented by appeal."

(h) ARGUMENT

(1) The Petition for Habeas Corpus to the Criminal Court of Appeals alleges facts supporting a contention of denial of a right protected by the due process clause of the Fourteenth Amendment to the Federal Constitution.

Although the broad ambit of the right to counsel today has been established in relatively recent years, its roots, modern historio-legal research reveals, are deeply imbedded in antiquity. (See George Heidelbaugh and Marvin Becker, Right of Counsel in Criminal Cases — an Inquiry into the History and Practice, Notre Dame

Law Rev. Vol. 28, p. 351). When the progressive development of the adversary method of criminal trials had finally crystalized into the form now accepted in the American Jurisprudence, the right to counsel became the most effective and indispensable guardian against any impurity in the ever-improving system of "ordered liberty." Later, after the rules of practice had become firmly cemented, a measuring gauge to protect and preserve the fundamental concept of the already established tradition was created. Engrafted upon the Fundamental Law of this Republic, it is known as Due Process of law. So deep and penetrating is its palladium that it goes beyond the mere surface and form to reach and test the substance of the matter.

Effective assistance of counsel in *capital cases* is a *conditio sine quo non* of due process. It is a right of substance and cannot be satisfied by mere form or perfunctory compliance. *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 1019, 77 L. Ed. 158, 84 A. L. R. 527. Extending beyond the portals of the courtroom proper, the right includes a reasonable opportunity for consultation and adequate time for preparation. Above all, however, the guaranty contemplates services of an attorney who gives his client complete loyalty, serves him in good faith, and is devoted to his cause. The basic integrity and a purity of an adversary trial depends upon the fidelity of counsel no less that upon the impartiality of the court.

Tumey v. *Ohio*, 273 U. S. 510, 41 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243; *People* v. *Lanigan*, 140 P. 2d 24; *U. S.* v. *Glasser*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, 148 A. L. R. 186. And the effect of counsel's disloyalty upon the substance of a hearing may be much more direct and penetrating than mob domination, "*Moore* v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543," or the introduction of perjured testimony. *Mooney* v. *Holohan*, *infra*.

> "Representation may be present and yet be so lacking in those fundamental precepts of justice as to amount to a denial of due process. The substance of due process may be denied although the accused is represented by a coterie of counsel; yet he may have it, although unaccompanied by counsel. Due process and lack of it is based upon substance and not mere form."
>
> *Amerine* v. *Tines*, 131 F. 2d 827.

The effect of counsel's adverse and conflicting interests upon due process of law is perhaps *primae impressionis*, although the question itself is not new to this Court.

In the case of *U. S.* v. *Glasser*, *supra*, this Court held that the accused had a right to present his defense "untrammeled and unimpaired" by the antagonistic and conflicting interests of his co-defendant. Moreover, it was said that the right to such loyal assistance is so essential that *mere showing of its denial* imports prejudice

and hence the same need not be shown specifically. Therein it was said:

> "The *right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Snyder* v. *Massachusetts,* 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575; *Tumey* v. *Ohio,* 273 U. S. 510, 535, 41 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; *Patton* v. *United States,* 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see *McCandless* v. *United States,* 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205." (Emphasis supplied).

A factual situation closely akin to the one at bar was considered in *Scott* v. *District of Columbia,* 214 F. 2d 860, wherein the court held:

> "* * * And we think it was impossible for the trial attorney to have given defendant the undivided and undiluted fidelity to which he was entitled. *He was presumably attempting to establish the innocence of Scott at the same time that he was under a a duty to protect the rights of Postell,* between whom and Scott there was such marked and unmistakable enmity. In the tangle of conflicting interests it seems almost inevitable that the defense of Scott lost that stout and unswerving loyalty which the law demands" (Emphasis supplied).

In *Craig* v. *United States,* 217 F. 2d 355, it was said:

> "Conflict of interest on part of counsel representing both accused and another defendant may be such as to deprive the accused of the effective assistance of counsel guaranteed by the VI Amendment to the Federal Constitution, and in determining whether such deprivation has occurred, *it is immaterial whe-*

ther such counsel has been appointed by court or selected by accused in absence of facts constituting waiver of right to such assistance."

Our search has also led us to a number of decisions of state tribunals of last resort which are in accord with the foregoing principles. *People* v. *Rocco*, 281 P. 443 (Cal.), (decision reversed on grounds of an express waiver by the accused in 285 P. 704); *People* v. *Lanigan* (Cal.), 140 P. 2d 24, 148 A. L. R. 176; *State* v. *Brazile*, (La.), 75 So. 2d 856; *People* v. *Bopp*, (Ill.), 116 N. E. 679; *People* v. *Robinson*, (Cal.), 269 P. 2d 6; *People* v. *Rose*, (Ill.), 180 N. E. 791. See also *Quality of Counsel*, Vol. 8, p. 484, Ark. Law. Rev.

See also Justice Lawlor's dissent in *ex parts Donough*, 149 P. 566 (now majority view—*Vide People ex rel. Vogelstein* v. *Warden of County Jail*, 270 N. Y. S. 362—affirmed in 271 N. Y. S. 1059).

The petition below (Appendix 7, 8), clearly alleges facts which show that the representation had by petitioner in his trial was such that it had failed to give him "unswerving and undiluted loyalty" to his cause; that he has not waived his right to a loyal counsel free from adverse influence; that he was denied the opportunity to present his defense, upon a trial for capital offense, unfettered by the antagonistic interests of accomplice Hurt, who, unknown to the petitioner had employed petitioner's chief counsel and exerted influence upon the planning

of the defense strategy. (Appendix 6); hence, that he was denied due process of law in that his trial was a mere sham and subterfuge which gave him a hearing only in form and not in substance. Therefore, we conclude the petition for habeas corpus alleges facts supporting a contention of denial of a federally protected right.

We are not unmindful that the decision of the Criminal Court of Appeals (Appendix 13), seems to rest upon state grounds. However, federal and state questions, having been properly raised (Appendix 9) in habeas corpus, the determination might have been based upon either. and since the state grounds are not sufficient, "it will be presumed that the State court based its judgment on the law raising the Federal question, and that this Court will take jurisdiction." *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398. Moreover, where the state provides corrective process for post-conviction claims of constitutional violations (Appendix 13), as in the instant case, and an error creeps into the proceeding, this Court held that it will exercise its supervisory powers to review the proceeding. *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61.

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(2) The Criminal Court of Appeals denied Petitioner due process of law in refusing to grant him a hearing on the merits.

The petition below contains allegations that the services of counsel for petitioner, so generously tendered

by Burns, proved, in the light of available evidence, but a Trojan Horse in the venter of which there lay hidden a deliberate scheme of Hurt to subordinate petitioner's defense to interests conflicting with, and inimical to his own; that, although petitioner did accept Burns' offer of joint representation, he did not know and, being in jail, could not have discovered by exercise of reasonable diligence, that the third, then undetected accomplice, Hurt, had secretly and unknown to him or Burns, shared the loyalty of chief counsel Tant and co-counsel Massad; that the petitioner, a mere cog-wheel in the conspiracy to rob, without any means of his own to retain counsel, lacked co-equal voice in the planning of defense strategy as he was not considered by either of the accomplices *par inter pares* (Appendix 6, 7); that after petitioner's trial attorney Plumlee had warned the Burns family that secret ties might exist between Hurt and the other attorneys, but that petitioner had no knowledge thereof until the facts were brought to light in the testimony of Massad and Tant in the trials of Hurt. Furthermore, the petition states that because of petitioner's ignorance and unawareness of all the back-stage machinations of Hurt, the petitioner "did not and could not intelligently and understandingly waive his constitutional right to the guiding hand of a competent and loyal attorney" (Appendix 8).

These allegations stand uncontroverted and undenied. Except for the intimation of Mr. Tant in his ex-

pose' to the Criminal Court of Appealsat the indagation of April 11, 1955, that the petitioner "understood" Tant might undertake to represent Hurt in the event that the latter should be charged in the case (Appendix 32), there is nothing in the record below that disputes the allegations. And the explanation of Mr. Tant, needless to say, does not positively and unequivocally refute the petitioner's contention that he has not been apprised of, nor has he given his consent to a joint representation with Hurt. Moreover, Mr. Tant's version is utterly ludicrous in the light of all circumstances surrounding the events. It was evident at the time that in order to charge Hurt, who had remained in the background of this lurid crime and hence could not be identified by the victims, the State would have had to have a confession of at least one of the two accomplices. Thus Hurt was safe so long as Burns and York could be "kept from talking." We should not assume that an attorney of Mr. Tant's stature, experience and astuteness would have overlooked the apparent precariousness of Hurt's situation and the conflict of interest between Hurt on one side and the two co-defendants. Under those circumstances, it is readily apparent that *timely objection to joint representation could have been made only by the attorneys who were fully apprised of the adverse interests involved. It is not to be presumed that the petitioner, a layman, was capable of a professional analysis and even if he were,*

he certainly had no knowledge of the secret ties between Hurt and the lawyers.

Yet, when confronted with these uncontradicted and undisputed facts, the court below ruled contrary to the unrefuted evidence, finding that petitioner's failure to interpose timely objection amounted to a waiver of right (Appendix 13).

We do not perceive upon what factual basis the court below has reached this conclusion and, since there is no evidence in support thereof, and no hearing was held at which proof to the contrary was adduced, we must assume that the finding of waiver was predicated on the theory that "where one attorney appears for two or more persons jointly charged with a crime and neither of the co-defendants objects to the joint representation" (Appendix 13), such failure to timely object raises a conclusive presumption of waiver. If this be the case, the ruling is clearly erroneous. There is no presumption in favor of a waiver; on the contrary, it is axiomatic that courts indulge every reasonable presumption against a waiver of constitutional rights and do not presume acquiescence in their loss. *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461. The determination of a waiver must be made from all the surrounding facts and circumstances and facts behind and beyond the record, if not inconsistent therewith, may be raised and looked into. *Johnson* v. *Zerbst, supra; Craig*

v. *United States*, 217 F. 2d 355; *United States* v. *Bergamo*, 154 F. 2d 31; *Walker* v. *Hudspeth*, 128 F. 2d 343. Failure of an accused to timely assert and preserve his right may also be excusable under certain circumstances and hence not constitute a waiver. *Craig* v. *United States*, *supra*. In the case of *Johnson* v. *Zerbst*, *supra*, this Court held:

> "A waiver is ordinarily an *intentional* relinquishment or abandonment of a *known right* or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused" (Emphasis supplied).

The trial record was naturally silent on the matter of waiver. The facts relied on in the petition for habeas corpus were all dehors the trial record, but they were in no way inconsistent therewith. On the contrary, the affidavit of Mr. Tant in support of the motion for Case-Made at the expense of county filed in the appeal case (Appendix 39), confirms many of the circumstances relied upon in the petition below. Among others Mr. Tant admits there that the representation of York was undertaken "to protect Burns" (Appendix 40).

In considering whether there has been a valid waiver it matters not that the attorneys were not appointed by the court but "selected" by the defendant, since prejudic-

due to failure of effective assistance results equally in either case. *Scott* v. *District of Columbia, supra; Craig* v. *United States, supra.*

Though branding the argument as "flimsy" (Appendix 24), the Criminal Court of Appeals nowhere seems to have questioned the sufficiency of the petition on its face to justify a hearing. On the contrary, by assuming original jurisdiction in the proceedings and setting the matter for a hearing (Appendix 11), the court below has, in effect, admitted that the allegations were sufficient. In *Ex parte Goff*, 194 P. 2d 206, Judge Brett, speaking for the Criminal Court of Appeals, held (p. 209):

> "* * * and in those instances (petition for habeas corpus by a prisoner in the penitentiary) we give every reasonable inference that we can to their petitions to see whether the same are *sufficient on their face to justify a hearing upon the issues thus raised* * * *" (Emphasis supplied).

Yet the court has repeatedly and persistently refused to give petitioner an opportunity to prove his allegations and open an inquiry into their verity.

In *Hawk* v. *Olson, supra,* this Court held:

> "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

In accord with the foregoing rule are the following cases decided by this Court:

Walker v. *Johnson*, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830;

Woods v. *Nierstheimer*, 328 U. S. 211, 66 S. Ct. 996, 90 L. Ed 1177;

Waley v. *Johnston*, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;

Hawk v. *Olson, supra;*

Cochran v. *Kansas*, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453.

Pyle v. *Kansas*, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214.

We have diligently examined and reviewed the decisions of this Court wherein a hearing was held not to be necessary to satisfy due process in disposing of post-trial claims of unconstitutional proceedings and we find them clearly distinguishable from the situation in the case at bar. In *Hysler* v. *State of Florida*, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed. 933, the method used by the state prisoner in asserting his claim of denial of a federally protected right was by the ancient writ of error *coram nobis*. In examining the requirements of pleadings which relate to these writs we note, that under the Florida practice, a petition for such writ must "make a full disclosure of the specific facts relied on, and the proof must enable the appellate court to ascertain whether, under settled principles pertaining to such writ, the facts alleged would afford, at least *prima facie*, just ground for an application to the lower court for a writ

of error *coram nobis.*" See also *Taylor* v. *State of Alabama*, 335 U. S. 52, 68 S. Ct. 1415, 92 L. Ed. 1935.

Oklahoma affords a more simple avenue to relief in the field of post-conviction remedies. (See Effect of the Federal Constitution in Requiring State Post-Conviction Remedies. Columbia Law Review, Volume 53, page 1143 and Federal Habeas Corpus for State Prisoners, Columbia Law Review, Volume 55, page 202). It has been the rule in this state that one imprisoned in violation of his constitutional rights may challenge the judgment in an *original proceeding for writ of habeas corpus* in the Criminal Court of Appeals of the State of Oklahoma. (See Habeas Corpus—Denial of Counsel Annotation. 146 A. L. R. 416, citing numerous Oklahoma cases). *Ex parte Barnett*, 94 P. 2d 18; *Ex parte Robnett*, 101 P. 2d 645; *Ex parte Stinnett*, 110 P. 2d 310; *In re: Flowers*, 111 P. 2d 509. This remedy, in view of the holding that the function and office of the common law writ of error *coram nobis* has been largely superseded by statutory remedies, is the only available post-trial remedy by which a violation of fundamental rights protected by the Federal Constitution may be brought before the bar of justice in Oklahoma. *Gibson* v. *State*, 197 P. 2d 310; *Ex parte Tidwell*, 239 P. 2d 524.

Neither did we find the case of *Canizio* v. *New York*, 327 U. S. 82, 66 S. Ct. 452, 90 L. Ed. 545, apposite. It appears that in the former, the allegations of the peti-

tion were disputed and contradicted by an affidavit filed in lieu of a response, whereas in the instant case the Attorney General has filed no response and neither has he produced any evidence in opposition to the petition. We further submit that the expose' of Mr. Tant (Appendix 29), taken alone, wholly lacks any basis upon which a finding of waiver could be made.

A post-trial opportunity to challenge a judgment of conviction upon the ground of denial of fundamental rights is a *sine quo non* of due process and thus the right thereto is protected by the Fourteenth Amendment.

In any event, the allegations of the petition are clearly uncontradicted and undenied. In the absence of any evidence disputing their verity, they should have been assumed to be true.

Williams v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398;

Tompkins v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407;

Rice v. *Olson*, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367.

Frank v. *Mangum*, 237 U. S. 309, 355 S. Ct. 582, 59 L. Ed. 969;

Moore v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 542;

Mooney v. *Holohan*, 294 U. S. 103, 55 S Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406;

Carter v. *State of Illinois*, 329 U. S. 173 67 S. Ct. 216, 91 L. Ed. 172;

Young v. *Ragen*, 337 U. S. 235, 69 S. Ct. 1073, 93 L. Ed. 1333.

Therefore, the Criminal Court of Appeals committed error in denying petitioner a hearing on the merits of the petition and in finding a waiver of a fundamental right without any evidential support therefor.

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(3) The Criminal Court of Appeals, in denying Petitioner the remedy of Habeas Corpus, unreasonably discriminated against him and deprived him of equal protection of the laws.

The court below ruled that the "question raised in habeas corpus was in existence and known to petitioner at time of appeal and was a matter which properly should have been presented by appeal" (Appendix 13).

We are again at a loss upon what basis the court found that at the time of his appeal in April, 1954, petitioner had knowledge of the facts relied on in the petition for habeas corpus. The record absolutely refutes such a conclusion. On the contrary, it was clearly shown that before Hurt's trial in November, 1954, petitioner possessed no factual evidence which could have been submitted in support of the present contention. Without Massad's testimony and Tant's judicial admission as to previous existence of attorney and client relations between him and Hurt, (which was made in November, 1954), it would have been, indeed, impossible for the

petitioner to present proof sufficient to entitle him to relief.

We must bear in mind that petitioner's appeal was frustrated by Tant's failure to further appear in November, 1954 (Appendix 36), without any notice or explanation to the petitioner. In the expose' to the court below Tant did not explain why he failed to notify the petitioner. Since no cross-examination was had, we don't have the benefit of Tant's explanation as to why, after petitioner had chosen to testify for the State, Tant's services came to such a sudden and abrupt end without any word of communication to York. Yet as late as November, 1954, at the trial of Hurt, Tant had assured petitioner, in open court, that he will continue to serve in the appeal case (Appendix 8, 9).

The petition for habeas corpus was filed in March, 1955, at least a week before the determination of the appeal (Appendix 35). Under the decisions in Oklahoma the post-trial institution of habeas corpus appears to be regarded as abandonment of appeal, *DeWolf* v. *State*, 255 P. 2d 949. But whatever its effect, we must consider that petitioner's cause *has received no consideration* on appeal and the decision rendered therein amounted to a default affirmance (Appendix 42). Under the circumstances as aforesaid, the remedy of appeal was frustrated by counsel's withdrawal — a situation analogous to failure to appeal. Failure by petitioner to appeal a judgment

of conviction, where incapacity is shown, is not adequate grounds upon which the court may deny a post-trial remedy where a claim of denial of fundamental rights is advanced. *Williams* v. *Kaiser, supra; Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469. In *Brown* v. *Allen*, this Court held that lack of counsel, incapacity, or acts of officials preventing an appeal, excuse the failure to timely raise the question of unconstitutional proceedings.

The ruling of the court below in Syllabus No. 4 (Appendix 13), appears to require that a question of constitutional violations, if in existence and known, should be timely presented by appeal and that failure to submit it for determination on appeal, bars all further relief. However, in the case at bar the evidence shows that the questions raised in habeas corpus, although in existence at the time of appeal, could not have been submitted therein, as petitioner lacked evidential proof thereof. The finding that the facts relied on were known to petitioner is without support in the record below. Furthermore, the record establishes (Appendix 42), that the judgment on appeal was affirmed by default due to withdrawal of counsel.

We are thus constrained to conclude that the foregoing holding of the Criminal Court of Appeals is in collision with the pronouncements of this Court requiring that post-conviction remedies be afforded for federal-

ly protected rights. *Young* v. *Ragen, supra; Carter* v. *Illinois, supra; Smith* v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 372.

Therefore, since there is no evidence of unexcusable delay or lack of diligence in presenting the federal question, petitioner should have been given an opportunity to have the petition considered. Moreover, since Oklahoma provides corrective process for post-trial claims of denial of federally protected rights (Appendix 13), denial of the writ without opportunity to prove allegations sufficient on their face unreasonably discriminated against the petitioner and deprived him of equal protection of the laws. *Cochran* v. *Kansas*, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453; *Dowd* v. *United States*, 340 U. S. 206, 71 S. Ct. 262, 19 A. L. R. 2d 784.

CONCLUSION AND PRAYER FOR RELIEF

In conclusion, it is respectfully submitted that this case presents a question which has long been a plague to the orderly administration of criminal justice — the odious practices of master criminals who, with a view to secretly protecting themselves, manipulate and direct, through the employment of counsel, the defenses of their minor accomplices.

The law, in its solicitude for orderly process of justice, cannot and must not refuse to take notice of the disruptive effect of such dual representation upon the

basic integrity of proceedings and purity of the bloodstreams of justice. Organized crime, through the use of unscrupulous attorneys, perverts the time honored methods of judicial inquiry by remotely guiding the presentation of defense. Quite frequently, as it is the case here, the defendant on trial has no knowldge who, to use the vernacular, is "pulling the strings" in this pathetic show of marionettes on the court room stage.

In the case at bar no hearing on the merits was held below and the petition must be deemed to have been disposed of, contrary to the mandate of this Court, by *arbitrary defenestration.* Thereby, the Criminal Court of Appeals has decided an important question of fundamental rights which has not been, but should be, settled by this Court, and has considered the same in a way which is in conflict with applicable decisions of this Court, thus departing from the requirements of due process so as to call for an exercise of this Court's power of supervision.

Wherefore, the petitioner respectfully prays that this Honorable Court exercise its discretion and under its supervisory powers assume jurisdiction of this case by granting a writ of certiorari directed to said Criminal Court of Appeals of the State of Oklahoma commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record in said cause entitled on its docket: *In re: Charles Edwin York* v. *H. C. McLeod, Warden of the*

State Penitentiary at McAlester, Oklahoma, No. A-12-181, and that said judgment of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Videatis Judices ne Quid Detrimenti Constitutio

Respectfully submitted,

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Of Counsel,
JULY, 1955.

The undersigned attorney for petitioner hereby certifies that he believes there is merit in the foregoing petition and that the same is filed in good faith and not for delay.

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Attorney for Petitioner.